No. 3838

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHELL COMPANY OF CALIFORNIA (a corporation),

Appellant,

vs.

PACIFIC STEAMSHIP COMPANY (a corporation of Portland, Maine), claimant and owner of the steamship "Admiral Goodrich", her tackle, apparel and furniture,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

THE PRESUMED AUTHORITY OF GOVERNMENT FORM TIME CHARTERERS TO PROCURE SUPPLIES ON THE CREDIT OF THE STEAMER CHARTERED.

Government form time charterers are presumed to have authority to procure supplies on the credit of the steamer chartered.

As opposed to this statement, the brief of the appellee states:

> "A charterer, as such, is not one of the individuals named in the Act of Congress of

> June 23, 1919, who is presumed to have authority from the owner to procure supplies for the vessel.
>
> "We are firmly of the opinion that the foregoing is the only real question involved in the determination of this case." (Brief, 10.)

In so stating the appellee fails to distinguish between the several different forms of charters in use.

Charters are, roughly, divisible into voyage forms, time forms and demise forms. Demise charters of ocean going steamers, or even sailing ships, are, as is well known, extremely rare. The few authorities dealing with demise charters of off-shore, or even coastwise, vessels show how very unusual they are. Demise charters are practically confined to the chartering of lighters, tugboats, ferryboats and small craft generally. On the other hand, when ships sail under voyage charters, fixing a rate for full cargoes of lumber or grain or coal or whatever the full cargo may be, the voyage charterer is practically the holder of the contract of affreightment, agreeing to furnish a full cargo on the ship chartered. Such a charterer has no control over the movements of the ship or her operation, and in fact, if a cesser clause is included in the charter, the charterer is free from any liability to the shipowner the moment that the cargo is fully loaded and the bills of lading signed.

Time charters are, however, entirely different from voyage charters. The time charterer is not a mere furnisher of cargo paying freight or dead freight depending upon whether the agreed cargo

is furnished or not furnished. The time charterer takes delivery of the vessel chartered, and, within certain trading limits usually set in the charter party, can use her for any lawful purpose he sees fit.*

All this is exceedingly elementary, but it seems to have escaped the notice of the appellee.

The charter of the "Admiral Goodrich" from the Pacific Steamship Company was the usual "Government form time charter" (Record, 7). This form, with a few minor variations, has been the basis of steamship time charters for the last forty years. It provides for the payment by the owners of wages, provisions, stores and insurance, and for payment by the charterers for fuel oil, port charges, dock charges, pilotage, stevedoring, etc. The charter provided for a term of three calendar months, for the ship to be "delivered" in San Francisco, and for a charter hire of $21,508 per calendar month,

> "commencing on the day of delivery as aforesaid; hire to continue from the time specified for terminating the Charter until her redelivery to Owners (unless lost) at San Francisco or Puget Sound, Charterers' option. * * *".

* "In the case of the trip charter party, the owner retains possession of, and operates, his vessel, and his payment is based upon the amount of cargo transported, at so much per ton, or per 100 pounds, quarter, bushel or other cargo unit. The time charter party, on the contrary, places the vessel in the possession of the charterer. It may, however, provide that the owner shall man and provision the vessel. In ocean traffic the usual practice is for the charterer to pay to the owner an agreed rate per dead-weight ton, and also to furnish the fuel and pay all expenses incurred at the ports, except crew and provision expenses."

(*Johnson: Principles of Ocean Transportation*, 1918, pp. 171, 174.)

Two other paragraphs of interest are:

> "5B. Charterers agree to keep vessel free from liens and redeliver her free from liens."
>
> "11. That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements * * * and the Charterers hereby agree to indemnify the Owners from any consequences and liabilities that may arise from the Captain signing such Bills of Lading, or in his otherwise following the Charterer's instructions".

The charter of the "Admiral Goodrich" was, therefore, as stated, a simple government form, with the only variation that contained in "5B" above quoted.* (Record, 7.)

The appellee, after urging that under section two of the Lien on Vessels Act of June 23, 1910, there is no presumption that a charterer has authority from the owner to procure supplies unless he is "the managing owner, ship's husband, master, or any person to whom the management of the ship is entrusted at the port of supply", argues that the "Admiral Goodrich" was not managed at San Francisco by the Gulf Mail Steamship Company.* This argument of the appellee is unsound for the following reasons:

* See, for discussion of Government form charters, chapter on subject in Ocean Shipping (pp. 310-319), The Century Company, 1920. For early form see "Time Charter—Government Form" in Reed's Shipowners' and Shipmasters' Handy Book (Sunderland, England), pp. 252-254.

* The appellee lays much emphasis on the case of *Curacao Trading Co. v. Bjorge*, 263 Fed. 693. In that case "The libelant's representative testified that the coal was furnished on the order and credit of the charterers".

(1) The undisputed testimony of Mr. Buckley was that the "Admiral Goodrich" was managed in San Francisco by the Gulf Mail Steamship Company (Dep. Buckley, 3).

(2) Entirely independent of this evidence, however, anyone familiar with the way in which shipping is done today realizes that when a ship comes to a port she is practically always looked after by an agent.*

(3) The charter party shows that the "Admiral Goodrich" was in the *possession* of the Gulf Mail Steamship Company, to be redelivered to the Pacific Steamship Company upon the expiration of the term of three months.

(4) The Supreme Court of the United States, in *The Kate,* 164 U. S. 456, at 460, a case construing a government form time charter, has held that the "charterer" had "possession and control" of the ship.

(5) Under the Act of June 23, 1910, Government form time charterers have presumed authority to

* "The duties of consignees or agents of ships, or the agents of charterers or owners, are so similar and undistinguishable that without some positive knowledge of their relations, contracts, and agreements, it is impossible to determine to which class an ageney may belong; and the fact that a merchant purchases supplies, or procures services to be rendered a vessel, raises no presumption that he therefor sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances, in ordinary practice, the material man or stevedore contracts with, and takes his bill for payment to, the agent of the ship, whether he represents the owners or charterers, without the intervention of the master; but by so doing, he does not abandon his right to look to the vessel in event of a nonpayment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties, in each particular case."

Norwegian Steamship Co. v. Washington [*The Kong Frode*], [1893], 57 Fed. 224, at 225.

bind the ship. This is clear from an examination of section three of the Act, which reads in part as follows:

> "The *officers* and *agents* of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by * * *". (Italics ours.)

The only *officer* mentioned in section two is the master. No *agents* are mentioned in section two except such as may be included in the term "person to whom the management of the vessel at the port of supply is intrusted". The statute thus includes agents at the port of supply as having presumed authority to bind the ship. A demise charterer is "an owner pro hac vice", so that the use of the word "charterer" in section three in addition to the use of the words, "an owner pro hac vice", very clearly shows that the word "charterer" includes an ordinary charterer, i. e., a time charterer. Charterers' agents are, therefore, specifically included in those with presumptive authority to order. It seems impossible to escape from these conclusions, which, moreover, have been clearly recognized by the courts.

As was stated by the Circuit Court of Appeals in *The St. Johns,* 273 Fed. 1005, at 1007:

> "To say that notice of a charter puts a supply man upon inquiry is in effect to hold that there is no presumption that a charterer may charge the ship, but the statute says that precisely that presumption shall exist."

II.

THE ALLEGED LACK OF GOOD FAITH BY THE SHELL COMPANY OF CALIFORNIA.

The development of the law, resulting in the test of *good faith* as determining whether the supply man has a lien, has been brought out in the opening brief.

The adoption of the rule in this circuit is made clear by the following language used in *The South Coast,* 247 Fed. 88:

> "It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in the maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, *we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the*

ship to engage in her accustomed traffic.'' (Italics ours.)

The Court in the above case then went on to say that in *The Kate,* supra, the decision hinged on the fact that there was an element of fraud in the transaction of claiming a lien, to which the libelant was a party.

The burden of showing the bad faith of the supply man is admittedly on the ship.

The Yankee (1916), (C. C. A. 4th); 233 Fed. 919, 926;

The Oceana (1917), 244 Fed. 80, 83.

The Pacific Steamship Company, in order to defeat the right of the Shell Company of California to a lien against the ''Admiral Goodrich'' for the fuel oil promptly delivered to that vessel, must therefore show that the Shell Company acted in bad faith and conspired with the Gulf Mail Steamship Company to perpetrate a fraud on the steamer. A charge that an oil company like the Shell Company of California, in a year of extreme commercial prosperity, and when a shortage of fuel was universally recognized, would stoop to sell some twenty-five hundred dollars' worth of oil in bad faith to a steamer, is, on its face, without merit.

The opinion of the lower Court does not discuss the principles underlying the right to a lien. The Court states that on cross-examination it was shown that the Pacific Steamship Company purchased fuel oil for the ''Admiral Goodrich'' nine times

within the ten months previous to June 21, 1919 (Record, 44). With due deference to the Court below, an examination of the letters referred to does not warrant such a statement. The brief of the appellee claims only four such sales (Brief, 7). The sales in question were made in the Orient through the Rising Sun Petroleum Company (Resp. Exhibits 1, 12, Dep. Buckley). They were made along with other sales of oil delivered to the "Admiral Wainwright", the "Libby Main" and the "W. F. Burrows" (Resp. Exhibits 1, 5, 6, 7, 8, 10, 11, Dep. Buckley). The "Libby Main" and the "W. F. Burrows" were *not* owned by the Pacific Steamship Company (Dep. O'Connell, 7, 8). The "Admiral Wainwright" was sold to the Dollar Company, and was for some time operated by that company under the name "Admiral Wainwright" (Dep. O'Connell, 8). The only "bought and sold note" introduced was with the Pacific Steamship Company, dated October 17, 1918, providing for the sale of oil to the "Admiral Goodrich". On this date the Pacific Steamship Company did not own the "Admiral Goodrich" (Woolsey, Record, 36). In other words, a study of these letters will show that the Pacific Steamship Company was acting as agent for itself or for owners or charterers of sundry ships in the Orient, and buying oil for them. There is nothing to indicate that the Pacific Steamship Company was recognized as an owner of the "Admiral Goodrich", any more than it was of the "Libby Main" or "W. F. Burrows"—and the two

latter vessels admittedly were not owned by the Pacific Steamship Company (Dep. O'Connell, 7, 8).

The only other ground upon which it was held that the Shell Company was constructively on notice of the terms of the charter party was a statement of C. F. Buckley that he could not keep track of the owners of the Admiral Line—Pacific Steamship Company—Pacific Alaska—Alaska Steamship Company steamers. In this he evidently was not alone. Lawrence O'Connell, the assistant general agent of the Pacific Steamship Company at San Francisco in 1919, while quite positive on direct examination that the Pacific Steamship Company owned the "Admiral Goodrich", later admitted that he did not know which Alexander Company owned her. He testified: "I don't know the inner workings; I am frank to say that" (Dep. O'Connell, 6).

When the charter party itself was drawn it was signed: "Pacific Steamship Company, agents for Owners", showing that apparently the very men who made out the charter party were not clear as to which company actually had title to the steamer.

Except as an academic question, however, the determining of just what corporation owned the "Admiral Goodrich" or owns any ship supplied, does not seem of particular importance. Ships are constantly changing ownership. No shipping man attempts to follow such changes. Practically all important operating companies are made up of groups of companies, with the parent company controlling

the subsidiaries by stock ownership. Vessels are switched around from one company to another with various charters, or operating or other agreements generally known to very few officials. The United Fruit Company used to carry title to each vessel of its large fleet in a separate corporation. Combinations like the P. & O., the Furness and the Ellerman lines have ten or more corporations apparently tied together by various agreements. All informed shipping men know this, but they are no more interested than is the passenger who travels on the lines. When a steamer of one of the above lines comes, for instance, to San Francisco, some recognized agent handles the ship. If an Ellerman ship, it is Norton, Lilly & Company, if a Furness ship, Swayne & Hoyt, Inc., if a Union Steamship (P. & O.) ship, Hind, Rolph & Co., Inc. The business is all done through agents, who may represent the owners or time charterers. The tugboat company and the stevedoring company and the fuel company and the furnishers of provisions do not know who owns the ship, and the very agents themselves are not apt to know just where the legal title to each ship lies. The services or goods are supplied to the ship on the orders of those handling her at this port; and when supplied, bills are sent to the ship and owners in care of the agents giving the order. Surely these supply men are not deprived of their lien rights because on each order from a responsible house they do not make an investigation of the companies owning and operating the ships.

So here in this case it is impossible to understand where bad faith can be presumed in the prompt filling of an order for fuel given by a shipping company of good repute, a time charterer advertising the "Admiral Goodrich" as one of its own line.*

III.

THE EFFECT OF A DECISION HOLDING THE SHELL COMPANY HAS NO LIEN ON THE "ADMIRAL GOODRICH".

Prior to the passage of the Act of June 23, 1910, it was established that the supply man furnishing supplies in a foreign port on the order of a charterer was entitled to a lien.

In *The George Dumois*, 68 Fed. 926, 929 (C. C. A. 5th, 1895), the Court sustained the lien of a Mobile coal company supplying fuel at Mobile to a steamer upon the order of the president of the

* It seems to be taken for granted that the charter forbade the charterer to purchase necessaries on the credit of the ship. But as was said by this Court in *The South Coast*, supra, to defeat the lien of a supply man who knows the terms of the charter there must be a clause that "unalterably inhibits the master of the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon". The clause, "*Charterers agree to keep vessel free from liens and redeliver her free from liens,*" does not, in our opinion, comply with this test. The charterer could not employ stevedores, or carry cargo or operate the ship at all without the incurring of inchoate liens. Whether they are enforced or not, is a different matter. Obviously, when a libel is filed against the ship the charterer is obligated under this provision to bond the ship; but this does not mean that the charterer has broken the charter as soon as he hires a tugboat, or puts a stevedore on board or loads a ton of cargo. For discussion see *The Surprise*, 129 Fed. 873, at 878, where the Court said:

> "The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement as effectual in law as an express one."

Under the law, insofar as it has been decided, a fuel company which had the "Admiral Goodrich" charter construed by its own lawyer would probably be advised that the Gulf Mail Steamship Company had the right to purchase fuel on the credit of the ship.

charterer of the steamer. The coal company knew that the steamer was chartered but did not know that in the charter the charterer agreed to pay for the fuel.

The Court said:

> "From the principles declared in The Kong Frode and in The Patapsco and cases there cited by Mr. Justice Davis, we understand the rule to be that, where necessary supplies are furnished to a ship in a foreign port, and they are received by the master, and used by him in the service of the ship a maritime lien results, unless it shall appear that the furnisher of supplies did not rely upon the ship, but trusted solely to the personal credit of the owner; and the burden of proof in such a case to defeat the lien lies upon the ship and her claimants. Applying this rule to the case in hand, we are compelled to differ with the learned judge of the court below as to the proper decision of this case. Taking the facts to be as we find them in the record, we cannot infer from them that the libelant in the court below (appellant here) furnished the coal on the personal credit of the charterers, and did not rely upon the credit of the ship."

The Philadelphia, 75 Fed. 684 (C. C. A. 1st, 1896), cited by this Court with approval in *The South Coast*, supra, is a similar case. Coal was furnished to steamers under charter upon the orders of the agent of the chartering line. The objection was made that the master was not shown to have given the order for the fuel.

The Court said (at p. 686):

> "It would be intolerable, and entirely contrary to the practice of the courts, to hold that

> persons furnishing vessels such supplies in small quantities, to meet the requirements of the law for effectuating a lien, must prove express orders by the master. It is prima facie sufficient in such cases that the supplies are of the character which we have described, and come aboard under such circumstances that the master can properly be assumed to acquiesce in their purchase and reception."

In *The Kong Frode,* supra, it was held that the mere fact of a vessel's being under charter by a charter party which makes the charterers liable for expenses of loading and unloading is not sufficient to exempt the vessel from liability to one who renders stevedore services at the request of charterers' agents; and it was further held that the burden was on the vessel to show that the stevedore had knowledge of the terms of the charter party.

It is now, in effect, urged by the appellee, that the Courts should turn about and hold that the Act of June 23, 1910, nullifies the above cases, and prevents a fuel company from obtaining a lien for fuel supplied to a ship under time charter in a foreign port. This is argued in spite of the fact that the Act has constantly been recognized as designed to protect and *enlarge* the rights of supply men.

It is further urged by the appellee that the Shell Company of California, which had previously billed the appellee for supplies furnished the "Admiral Goodrich", on receiving two months later, another order from the same ship from a different company managing the ship and advertising the vessel as one

of its own fleet, is required to investigate the ownership and the charter of the vessel or else be held to have acted in bad faith. If the Act of June 23, 1910, is so construed, it needs no argument to show that Congress by that Act dealt a stunning blow, not only to the rights of supply men, but also to the consequent credit of ships, and increased the confusion in the maritime law existing prior to that date.

Dated, San Francisco,
May 15, 1922.

Respectfully submitted,

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